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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

REVEREND WALTER J. ROBOKOFF, KATHLEEN BATES, STEVEN NATIELLO and MICHELE STERLACE-ACCORSI

Petitioners,

v.

WOMEN'S CHOICE OF BERGEN COUNTY, P.A.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994), this Court replaced the "reasonable time, place and manner" analysis to be applied to injunctions with the more rigorous standard of "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) this Court required "precision of regulation" with regard to injunctive relief which burdens speech, protecting and separating peaceful speech from unprotected non-speech activities. Against this background the first question asked is:

   > Whether the decision of the New Jersey Appellate Division upholding an injunction which prohibits speech in front of an abortion clinic, without any showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, is inconsistent with this Court's decision in *Madsen*.

2. The second question is:

   > Whether the decision of the New Jersey Appellate Division, in upholding an injunction which prohibits speech by defendants who did not engage in unlawful acts or violate preliminary restraints, burdens more speech than necessary to serve a significant government interest.

PARTIES

The Petitioners are as follows: Reverend Walter J. Robokoff, Kathleen Bates, Steven Natiello and Michele Sterlace-Accorsi.

The Petitioners were defendants in the New Jersey Chancery Division and Appellants in the New Jersey Appellate Division. They were also petitioners in the New Jersey Supreme Court.

The Respondent is as follows: Women's Choice of Bergen County, P.A. The Respondent was the plaintiff in the New Jersey Chancery Division and Cross Appellant in the New Jersey Appellate Division. It was also a cross-petitioner in the New Jersey Supreme Court.

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No. 95 -

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

DECISIONS BELOW

By Order to Show Cause and Complaint, the Respondents commenced an action in the Superior Court of New Jersey, Chancery Division, Bergen County on July 13, 1989 seeking injunctive relief against all First Amendment activity on the sidewalk in front of their place of business. The Chancery Division issued an Order to Show Cause with Temporary Restraints on July 13, 1989 and an Interlocutory Injunction on August 8, 1989, all on an *ex parte* basis.

Petitioners intervened in the action on December 1, 1989 to contest the validity of the injunction. After trial in December 1991, the Chancery Division issued an opinion on February 19, 1992, which was embodied in an order on March 27, 1992.

An appeal was taken by Petitioners. On July 1, 1993, the New Jersey Appellate Division affirmed. Petitioners then filed a Petition for Certification in the New Jersey Supreme Court, which granted certification on April 7, 1994 and summarily remanded the matter to the Chancery Division for reconsideration.

On remand, the Chancery Division issued a supplemental opinion on March 14, 1995 and issued an order on April 7, 1995 which retained all provisions of the earlier order. Petitioners again appealed to the New Jersey Appellate Division. On April 25, 1996, the Appellate Division issued an opinion which affirmed in part and reversed in part, and remanded the matter to the Chancery Division for entry of an order consistent therewith. The modified order was entered on June 25, 1996.

Petitioners filed another petition for certification in the New Jersey Supreme Court, and Respondents filed a cross-petition. Both the petitions were denied September 25, 1996.

JURISDICTION

This Court has jurisdiction, under 28 U.S.C. Section 1257 (3) to review the final judgment of the highest court of a State "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . ." The jurisdiction of the New Jersey Supreme Court was properly invoked and it declined to review the judgment of the Appellate Division.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution Amendment I provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ".

STATEMENT OF THE CASE

In this case the Supreme Court of New Jersey has permitted an injunction which (*inter alia*) forbids peaceful picketing, leafleting, and conversation by Petitioners on public sidewalks and rights of way. There was a specific finding by the trial court that the Petitioners have not engaged in any behavior which is unlawful or otherwise prohibited. Moreover, there was no finding that the Petitioners contemplated any future behavior which is unlawful or otherwise prohibited. The very foundation of the First Amendment is severely damaged by this decision.

This is *not* a "rescue" case. There were no pro-life sit-ins or blockades at the plaintiff abortion facilities before the order to show cause with temporary restraints was issued. There was no finding that the Petitioners ever engaged in any illegal activity. On the contrary, the Chancery Division stated in its opinion:

> The named defendants will be bound by the injunction in the same manner as others having notice of the restraints. *They were not shown to have engaged in the unlawful 1989 acts nor to have violated the preliminary restraints.* (Emphasis supplied)

The principal question in this case is whether the New

Jersey Supreme Court erred by suspending the Petitioners' right to engage in speech on public sidewalks and streets.

As a matter of evidence and constitutional law, the answer is clear. The injunction unconstitutionally restricts and discriminates against Petitioners' free speech rights. Furthermore, the injunction is in direct violation of the principles set forth in this Court's *Madsen* decision.

This Court should grant this petition for certiorari and correct this manifest attack on the core of the First Amendment: the protection of disfavored speech in the traditional public forum of public sidewalks and streets.

Speech that is popular or pleasant has little need for constitutional protection. *City of Houston v. Hill*, 482 U.S. 451, 462 n.11 (1987). The true test of the right to free speech, under the First Amendment to the United States Constitution, is the strength of the protection that right affords to speech that is unpopular, unpleasant, disturbing, or even despised. *E.g.*, *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning).

The most important reason to grant this petition is to restrain the manifestly improper application of the *Madsen decision*. Without correction by this Court, the free speech rights of persons who "were not shown to have engaged in . . . unlawful . . . acts nor to have violated . . . preliminary restraints . . . ." will be severely curtailed.

STAGE AT WHICH, AND MANNER IN WHICH, FEDERAL QUESTIONS WERE RAISED BELOW

The federal questions raised here were first raised by

Petitioners at the time of trial. Petitioners presented six witnesses, in addition to themselves, during the course of the trial which took place in December 1991. All agreed that the conduct of Petitioners has been exemplary. The Petitioners have been so considerate and well behaved that three former patients of respondent came forward, without compulsion, to testify on behalf of Petitioners. Each testified that the sidewalk counselors outside the premises were calm, quiet and peaceful, and that they had been treated courteously by the Petitioners.

The absence of the required showing of illegality and the excessiveness of the injunction were raised at summation on December 4, 1991, in the brief filed with the Appellate Division on September 17, 1992, at oral argument before the Appellate Division on May 25, 1993, in the petition for certification filed with the New Jersey Supreme Court on July 28, 1993, in five supplemental briefs filed with the Chancery Division on May 26, 1994, June 2, 1994, August 25, 1994, December 2, 1994 and December 9, 1994. They were also raised in the brief filed with the Appellate Division on September 30, 1995 and the petition for certification filed with the New Jersey Supreme Court on May 28, 1996.

ARGUMENT

I. The State Court has Decided Two Federal Questions of Constitutional Importance In A Manner Inconsistent With Applicable Decisions of This Court

This petition for a writ of certiorari presents significant and compelling constitutional issues. In *Madsen*, this Court required precision of regulation by courts in issuing injunctions which burden speech. In determining the standard to apply to injunctions against protected First

Amendment conduct, the Court in *Madsen* examined the differences between an injunction and a generally applicable ordinance. Those differences were set forth as follows:

> There are obvious differences, however, between an injunction and a generally applicable ordinance. Ordinances represent a legislative choice regarding the promotion of particular societal interests. Injunction, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree. (See United States v. W.T. Grant Co., 345 U.S. 629, 632-633 (1953).) Injunctions also carry greater risks of censorship and discriminatory application than do general ordinances. "[T]here is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." (Railway Express Agency, Inc. V. New York, 336 U.S. 106, 112-113 (1949).)

The Court held "that these differences require a somewhat more stringent application of general First Amendment principles in this context." *Madsen*. In other words, injunctions are to be more closely scrutinized than generally applicable ordinances. "Accordingly, when evaluating a content-neutral injunction, we think that our standard time, place and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than

necessary to serve a significant government interest." Since this Court sets forth a stricter test than that previously applied by the highest court of New Jersey, the injunction at issue here must meet that standard.

A. THE *MADSEN* CASE PROHIBITS THE NEW JERSEY COURTS FROM ENJOINING FREE SPEECH WITHOUT SHOWING THAT THOSE ENJOINED HAVE VIOLATED OR WILL VIOLATE APPLICABLE LAW

In *Madsen*, this Court stated that injunctions "are remedies imposed for violations (or threatened violations) of a legislative or judicial decree." This Court continued "[A]n injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a 'cognizable danger of recurrent violation.'"

In *Madsen*, this Court explained that "[t]he state Court imposed restrictions on petitioners incidental to their anti-abortion message because they repeatedly violated the Court's original order." This Court also noted "[t]he failure of the first injunction to protect access," the fact that "petitioners themselves studiously refrained from challenging the factual basis for the injunction," and "for purposes of this appeal [petitioners] are assuming *arguendo* that a factual basis exists to grant injunctive relief."

The context is far different in the within matter. The Chancery Division specifically found, after more than two years of discovery and three days of trial, that the Petitioners "were not shown to have engaged in the unlawful 1989 acts nor to have violated the preliminary restraints." Accordingly,

Madsen prohibits any injunction against these Petitioners, who have not "violated, or imminently will violate, some provision of statutory or common law."

B. THE INJUNCTION HEREIN, BY RESTRICTING THE SPEECH OF INNOCENT PARTIES, BURDENS MORE SPEECH THAN NECESSARY TO SERVE A SIGNIFICANT GOVERNMENT INTEREST.

The decision in *Madsen* requires "the injunction burden no more speech than necessary to serve a significant government interest." This Court held that a 36 foot buffer zone was necessary because of "the failure of the first order to accomplish its purpose," and found that the petitioners "repeatedly violated the Court's original order."

None of these circumstances are present here. The Chancery Division found that the Petitioners engaged in no illegal activity, and never violated any provision of the preliminary restraints. None of the four named defendants or six witnesses observed any such acts or violations. The Respondent admitted that it could not identify any specific individual who had complained about Petitioners, and that no patients had ever expressed a desire to participate in the case on behalf of the Respondent. On the contrary, three of Respondent's former patients were so impressed by the Petitioners' exemplary conduct that they asked to testify on Petitioners' behalf.

The New Jersey courts have never identified any significant government interest which would be served by prohibiting Rev. Robokoff, Ms. Bates, Ms. Sterlace-Accorsi and Mr. Natiello from using a public sidewalk. On the contrary, the trial court specifically found that the Petitioners

are innocent of any wrongdoing. They are being persecuted and deprived of their right of free speech merely because they are pro-life. It should be obvious that the New Jersey courts are burdening "more speech than necessary to serve a significant government interest."

The New Jersey Appellate Division dismissed this argument in their opinion dated April 25, 1996, saying:

> "we believe that Judge Lesemann acted correctly and reasonably in enjoining defendants-appellants. He concluded that it would be unfair and unworkable for purposes of the injunction to create two classes of demonstrators, based upon distinguishing those identified as having engaged in the harassing and disruptive conduct from those who were not known to have done so."

This reasoning fails to measure up to the *Madsen* standard for two reasons. First, the New Jersey court has decided to ignore the Constitutional rights of the Petitioners merely because the protection of those rights would be "unfair and unworkable." Second, the court ignores the fact that no "demonstrator" was ever "identified as having engaged in the harassing and disruptive conduct."

CONCLUSION

The highest court of New Jersey has declined to vacate an injunction which impairs one of the most precious rights, privileges and immunities provided by the Constitution. Its decision is inconsistent with applicable decisions of this Court. The State of New Jersey has deprived the Petitioners

of their rights under the United States Constitution Amendment I without the required showing that Petitioners have violated or imminently will violate, some provision of statutory or common law. The State has burdened more speech than necessary to serve a significant government interest. The Petitioners respectfully request this Court to grant this Petition and correct the manifest injustice caused by the State of New Jersey.